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**80-903**

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

STATE OF IDAHO
Respondent

v.

WILLIAM V. FOWLER
Petitioner

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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## QUESTIONS PRESENTED FOR REVIEW

1. Where a citizen driving on the highway is stopped and placed under custodial arrest to investigate whether he has committed a felony, as falsely alleged by an anonymous informer, is a search of the vehicle, pursuant to the arrest, valid if the police also cite the citizen for a traffic offense.

2. Can an item be seized without probable cause, for investigatory purposes, by an officer from another jurisdiction, on the scene as a result of false information.

## PARTIES

The parties to this action are William V. Fowler, Petitioner, and the State of Idaho, Respondent.

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## REFERENCE TO REPORTS

The opinion of the Supreme Court of the State of Idaho has been reported, unofficially, in 27 Idaho Capital Reports 1089.

## JURISDICTIONAL GROUNDS

The decision of the Supreme Court of the State of Idaho affirming the judgment of the trial court was entered on the 7th day of October, 1980. Jurisdiction is sought on the grounds that the Idaho Supreme Court, the court of last resort in the State of Idaho, has decided a federal question in a way which is in conflict with applicable decisions of this Court. The statutory provision relied upon for jurisdiction is 28 USC § 1257 (3) because Petitioner claims a right to be free from unreasonable

searches and seizures, as guaranteed to him by the 4th Amendment of the United States Constitution and made applicable to the states by the 14th Amendment of the United States Constitution and by various decisions of this Court. The protection assured by the 4th Amendment has been transgressed by the decision of the Supreme Court of the State of Idaho.

## CONSTITUTIONAL PROVISIONS RELIED UPON

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
> U.S. CONST. amend. IV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

## STATEMENT OF THE CASE

In this case the Petitioner had been having marital difficulties and has separated from his wife. His three daughters were staying with his sister-in-law. Unbeknownst to the Petitioner, his wife sought a restraining order granting temporary custody of the children to her. The order was not served

upon Petitioner.

On August 31, 1977 the Petitioner went to the residence of his sister-in-law, Mrs. Erk, and asked for his gun. Mrs. Erk refused. Petitioner then left with one of his daughters.

Sometime prior to his arriving at the Erk residence, an unidentified person phoned the Kootenai County Sheriff's Office to report that the Petitioner was driving from Spokane, Washington, to Coeur d'Alene, Idaho, to "forcibly take a juvenile female from the residence." (testimony of Officer Black at Motion to Supress, p. 28, ll. 21-22.)

On his way to the residence, the officer observed the described automobile heading in a westerly direction on Interstate 90 (toward Spokane,

Washington) and alerted other authorities. Subsequently, the Washington State Patrol received a message that the vehicle was enroute to Washington and that the subject was involved in a kidnapping, was armed and dangerous.

Eventually two Washington State patrol cars pulled up behind the vehicle driven by the Petitioner, Fowler, on Interstate 90, east of Spokane, in the State of Washington, and proceeded to follow him. One of the officers testified that the vehicle then went partially onto the shoulder of the road and back again. The officers had radioed for assistance and had two backup units waiting to assist the troopers further down the road when the Petitioner voluntarily pulled over, exited his car and walked back towards them, with his hands

visible, and asked what the problem was.

One officer covered Petitioner with a shotgun while he was frisked, handcuffed and placed in the rear of the Washington State patrolman's vehicle. At the Motion to Supress, one officer testified "We were just acting on our radio's information and as far as we knew, we might have had to release the subject once the Idaho authorities arrived." The other officer testified "Until the Idaho authorities arrived, we weren't sure exactly what we had."

The officer then approached the vehicle driven by Petitioner and observed a rifle and shotgun laying in the back seat. These were removed, examined, and found to be unloaded. Another weapon, a loaded .25 caliber pistol, was found underneath the driver's seat.

Subsequently, the Petitioner's estranged wife arrived at the scene, on the shoulder of the freeway, and indicated that there was another weapon in the car, a 9mm automatic. The officer examined the car again and found a .45 caliber revolver which was unloaded. About that time, the Kootenai County, Idaho, Sheriff's deputy arrived on the scene and Mrs. Fowler stated to him, pointing at the .45 revolver, "That was the gun used in the Mileck deal." Whereupon the Idaho officer seized all the weapons, except for the .25 caliber pistol. The reason for the seizure, as stated by the officer at the Motion to Suppress, was "for further investigation, for if nothing else, to ascertain ownership." (Motion to Supress transcript, p. 33, ll. 16-18.)

Petitioner was cited by the Washington State Police for a traffic violation and on having a loaded weapon in the car. Subsequently, he was charged in Idaho with assault with a deadly weapon, a felony.

At the trial, the ballistics test showed that the .45 caliber weapon seized was the weapon used to fire shots at the wall of a house, owned by one Gene Mileck.

Petitioner's former wife identified the weapon as being her husband's. Petitioner was notified that she was being called as a witness only two days prior to the trial, even though she was subpoenaed two weeks prior to trial.

Petitioner was convicted and sentenced to an indeterminate period, not

to exceed three years in the custody of the State Board of Corrections.

Petitioner raised the issues presented regarding the search and seizure of the weapon at a motion to suppress evidence based upon an unlawful, illegal and unconstitutional search and seizure, prior to trial. (Clerk's Transcript on Appeal, p. 53, Court's Decision, pp. 81, 85, 99.) The issue was again raised on appeal, Appellant's Brief, pp. 7, 8, 12.

The issue regarding the testimony of Petitioner's wife to testify was raised at trial by objection (Trial Transcript, p. 127, ll. 5-7) for motion for a mistrial, Trial Transcript, pp. 208-209, and in Appellant's Brief on appeal, pp. 7, 35.

## ARGUMENT

Bill Fowler was driving his automobile with his daughter in the front seat. He noticed two police cars following closely behind him. He pulled over to allow them to pass or to see if they were after him. The officers pulled over as well. Because Fowler had a weapon in the car, he exited so that there would be no misunderstanding. His arms and hands were in plain view.

One police officer raised his weapon. Fowler was handcuffed and placed in the back seat of the patrol car. His freedom to travel had been brought to an abrupt halt.

The officers then proceeded to rummage through his automobile. His private possessions were intruded upon by the

authority of the State, backed by weapons and mechanical restraints. How can this happen? Someone -- identity unknown -- said that Fowler was invovled in a kidnapping.

An individual is protected from being seized and his property searched by the 4th Amendment of the United States Constitution, which has been made applicable to the states through the 14th Amendment. Mapp v. Ohio, 367 U.S. 643 (1961). If the officers had probable cause to stop and search the automobile, the intrusion could have been justified. But where the information which the officers relied upon was not based on probable cause, the results of the search, pursuant to the arrest, must be suppressed. This court has so ruled in Whitely v. Warden, 401 U.S. 560 (1971).

In that case, the petitioner challenged the constitutionality of the search and seizure of evidence from his automobile by a federal writ of habeas corpus, after exhausting applicable state remedies.

Whitely was accused of breaking and entering into a business by a county sheriff who signed the complaint charging the petitioner. A warrant for his arrest was issued and a bulletin was broadcast on the police radio describing petitioner, the type of car he was probably driving, the amount of money which was taken, and reciting the fact that a warrant had issued for his arrest. The petitioner was subsequently arrested by a patrolman on the basis of the radio bulletin. Pursuant to the arrest, a search of petitioner's vehicle was made and fruits of the crime found.

The Court held that because the initial complaint lacked sufficient information upon which a judicial officer could make an independent finding that probable cause existed to justify the issuance of a warrant, the arrest was invalid. Because the arrest was invalid, the search pursuant to the arrest was declared to be illegal and the evidence obtained as a result thereof was suppressed. The respondent argued that regardless of the insufficiency of the complaint, the officer who made the arrest possessed sufficient factual information to support a finding of probable cause for arrest without a warrant.

The Court held "the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and

search are at least as stringent as the standards applied with respect to the Magistrate's assessment." Whitely v. Warden, 401 U.S. at 566. The Court determined that the radio message in and of itself did not provide sufficient probable cause to arrest without a warrant.

The Court held that the actual arresting officer is entitled to assume that the officer requesting aid via radio offered the Magistrate information sufficient to support an independent judicial assessment of probable cause and act on the strength of the radio bulletin. But the Court further stated "Where . . . the contrary turns out to be true an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to

rely on fellow officers to make the arrest." 406 U.S. at 568.

## PROBABLE CAUSE

There was no probable cause for the troopers in Washington to arrest Petitioner. They received information on their radio which had been received from Idaho. The information was that the Sheriff's Department had information from an unnamed source that Petitioner was enroute from Spokane to remove a juvenile female from the Erk residence. The State of Idaho was unable to show whether any inquiry had been made as to the relationship between Petitioner and the juvenile female, his daughter. Had a Magistrate been involved, one or two questions would have sufficed regarding the relationship between Petitioner and the juvenile, to demonstrate whether or

not probable cause existed. The facts show that Petitioner was not arrested and could not have been arrested for kidnapping his own daughter, and an inquiry into the situation by a neutral person would have prevented this intrusion into the private affairs of the Petitioner.

The Idaho Court seemed to believe that there was an eyewitness to support the fact that there had been a kidnapping. The testimony from this witness, however, indicated that she was not the person who provided the information to the sheriff's deputy who relayed the information to the Washington State authorities.

Other issues may be raised as to whether the Washington State Police had independent grounds to arrest and whether, even if independent grounds existed to

search, there was probable cause to seize the unloaded revolver.

The Arrest

The first question is whether Petitioner was actually arrested. The holding of the Court in Brown v. Illinois, 422 U.S. 590 (1975), confirms that the action of the police did constitute an arrest. The Petitioner was placed in the rear of a patrol car and handcuffed. His freedom to leave was definitely restrained. The Idaho Court commented on the voluntariness of Petitioner stopping his car. The stop was voluntary only because two patrol cars were behind him. The officers testified that Fowler came back to ask what the problem was. It also seems clear that the arrest was not for the traffic violation. Citizens are not normally arrested at the point

of a shotgun for traffic violations. The statements of the arresting officers confirm that the custodial arrest was not for the traffic violation. Each State trooper stated he didn't know what they had and they were holding Petitioner until the authorities from Idaho arrived. In the present case, the traffic citation, it seems, was given to Petitioner as an afterthought. Cf. State v. Hehman, 90 Wash.2d 45, 578 P.2d 527 (1978) (custodial arrest for traffic violation against public policy, prospective application only.)

The officers attention was drawn to Petitioner because of the radio broadcast. Only after they began following him did they observe him cross onto the shoulder of the road. At that point they chose not to arrest him. To say

that the custodial arrest was based upon the traffic violation would be to allow police officers to construct, after the fact, grounds for an arrest. The officers own testimony was that they did not know if Petitioner would have to be released when the Idaho authorities arrived on the scene. To determine whether the citation for the traffic offense legitimized the custodial arrest, an analogy to the tests of Wong Sun v. U.S., 371 U.S. 471 (1963), and Brown v. Illinois, 422 U.S. 590 (1975), is appropriate. If the traffic citation was sufficiently attenuated from the custodial arrest based upon the kidnapping, the seizure of Petitioner's person was not tainted by the illegality of the initial grounds of the arrest and the subsequent acts may be valid. But, the acts of the officers had one purpose -- to detain

Petitioner until the Idaho authorities arrived. The traffic citation was no more than a pretext, used to justify the initial unlawful seizure of Petitioner's person. Similarly, the arrest for possession of a loaded weapon arose only after the initial detention and search of the car. The evidence found after the search cannot justify the arrest. The arrest should be found to be illegal and the evidence which was seized as a result should be suppressed.

The Seizure

Assuming, arguendo, the search was valid, the question remains whether probable cause existed to seize the unloaded weapon from the vehicle. The most important point is that there was nothing inherently illegal about Petitioner possessing the unloaded .45, nor

was there probable cause to believe the weapon was an instrumentality or evidence of the crime with which Petitioner was subsequently charged twenty days after the seizure. Once it had been determined the gun was not loaded, there was no reason to keep the weapon. Only after the seizure did the State run a ballistics test which showed that the weapon was the one used in the assault with a deadly weapon charge. It was the seizure and subsequent testing of the weapon which gave the State of Idaho probable cause to charge Petitioner with the crime.

The officer from Idaho who seized the weapon stated he seized it "for further investigation, for if nothing else to ascertain ownership." No decision of this Court permits seizure of evidence without probable cause, whether evidence

is seized pursuant to a warrant or pursuant to an exception to the warrant requirement.

The seizure was made because an unidentified person alerted the police that Petitioner was involved in a kidnapping. This statement was patently untrue. This is what brought the deputy sheriff to the scene. The Idaho Court seemed to believe the information came from an eyewitness. This is not borne out by the record.

As a result of the false information, the officer placed himself in a position where he could seize the weapon without obtaining permission from the Petitioner. It cannot be said that because Petitioner was in custody any of his property was subject to examination and testing by the police. This situation is precisely

why the 4th Amendment was adopted. Petitioner's wife stopped at the scene and indicated to the officer that the gun was used in the "Mileck deal." Even though the officer had some knowledge of this incident, the reason for the seizure was testified to by the officer: "for further investigation. . ." The Idaho Supreme Court did not determine whether probable cause existed for seizure of the revolver.

The unlawful seizure of the property of Petitioner warrants suppression of the evidence. This Court should grant Petitioner's request for certiorari to the Supreme Court of Idaho to determine the validity of the arrest and whether probable cause existed to seize the revolver.

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# APPENDIX

# APPENDIX

## Opinion of the Supreme Court

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Case No. 12971

STATE OF IDAHO
Plaintiff-Respondent

v.

WILLIAM FOWLER
Defendant-Appellant

Coeur d'Alene, May 1980 Term

Filed: October 7, 1980

R. H. Young, Clerk

Appeal from the District Court of the First Judicial District of the State of Idaho, Kootenai County. Honorable James G. Towles, District Judge.

Appeal from a jury conviction of assault with a deadly weapon. Affirmed.

Stephen B. McCrea, Coeur d'Alene, for appellant.

Honorable David H. Leroy, Attorney General, State of Idaho; Lynn E. Thomas, Deputy Attorney General, State of Idaho; and Eugene A. Ritti, Deputy Attorney General, State of Idaho, Boise, for respondent.

SHEPARD, J.

This is an appeal from a conviction of assault with a deadly weapon which was entered following a trial and a jury verdict of guilty. We affirm.

Defendant Fowler had a long-standing feud with one Gene Mileck. Shortly after midnight during June, 1976, someone fired a series of shots into the Mileck home and set fire to two automobile vans belonging to Mileck which were parked outside his home. Shortly thereafter, Mileck received a phone call,

in which the caller expressed dismay that Mileck was still alive and threatened to kill Mileck the next time. Mileck identified the voice of the caller as that of Defendant Fowler. Fragments of bullets were found in the Mileck home, which later ballistic tests indicated were fired from a .45 caliber revolver found in the possession of defendant Fowler.

Prior to August 31, 1977, marital difficulties had arisen between defendant Fowler and his wife, and the three Fowler children were staying with one Karen Erk, Mrs. Fowler's sister. Mrs. Erk believed that Mrs. Fowler had obtained a restraining order preventing defendant Fowler from interferring with her custody of the children. That restraining order was not issued and served on Fowler until September 1.

On August 31, 1977, an unidentified person phoned the Kootenai County Sheriff's Office to report that defendant Fowler was driving from Spokane to the Erk residence in Idaho to abduct a young girl. An officer Black was dispatched to the Erk house. During that time, defendant Fowler, who was described as highly agitated, had arrived at the Erk residence and demanded a gun, which Erk refused to give to him. Fowler then left with one of the children. Mrs. Erk talked with the Sheriff's Office about the incident because she was concerned over the safety of the child. While officer Black was driving to the Erk house, he saw a car matching the description of the Fowler vehicle moving in the direction of Spokane.

Officer Black radioed the Sheriff's

Office and in turn the Washington State Patrol were notified that defendant Fowler was driving toward the Idaho-Washington state line, was involved in a kidnapping, and was believed to be armed and dangerous. On the Washington side of the state line, two troopers, Kentworthy and Wunsch, saw the defendant in his automobile and began following him. Although the defendant illegally changed lanes and was speeding, the Washington officers did not use their sirens or lights, nor did they pull him over. Since they were informed that Fowler was armed and dangerous, they intended to stop him further down the highway where more troopers were waiting.

Before reaching the planned interception point, however, Fowler pulled his automobile over onto the shoulder,

stopped, got out of the car and walked toward one of the troopers. He was covered with a shotgun, frisked, handcuffed, and placed in the trooper car. Trooper Wunsch approached the Fowler car and noted two weapons in plain view on the back seat of the car. He opened the car door, took those two weapons which were unloaded, and found a third loaded .25 caliber automatic underneath the front seat of the car. Those guns were placed on the hood of the Fowler vehicle.

At about that time, Idaho officer Black arrived at the scene, as did Mrs. Fowler, accompanied by one Tuefel. Tuefel indicated that the two unloaded guns from the back seat belonged to Tuefel and had been stolen. Mrs. Fowler informed Trooper Kentworthy that another

gun still remained in the car. Further examination of the vehicle revealed an unloaded .45 caliber revolver under the front seat of the vehicle, which Mrs. Fowler then stated was used "in the Mileck deal." The Washington state troopers retained the loaded .25 caliber automatic weapon for further proceedings in Washington and handed over the other three firearms to Idaho officer Black.

It is defendant Fowler's principal contention on appeal that the .45 caliber revolver was the product of an illegal search, was illegally seized and should have been suppressed. Because of the above recited complex facts, it may be useful to note what this case does not involve. Fowler had voluntarily pulled off the highway, stopped his vehicle, exited therefrom, and approached the

police. Hence, the case does not involve the legality of an involuntary stop. Our narrow focus is on the question of whether the Washington state troopers lawfully searched for and seized the .45 caliber revolver hidden beneath the front seat of the Fowler vehicle. That issue must be addressed with particular attention to Washington state law.

The case at bar is distinguishable from State v. Lesnick, 530 P.2d 243 (Wash.), cert. denied, 423 U.S. 891 (1975). In Lesnick, the Washington Court held that the police had no right to rely on an anonymous tipster to stop Lesnick's car, and because that stop was not warranted, the police had no right to be in a position to observe gambling paraphenalia in the back seat of defendant's vehicle. Here, however, Fowler

had voluntarily pulled his vehicle off the highway, stopped and exited his car. Hence, Washington state trooper Wunsch had a right to be where he was when he observed the two weapons in plain view on the back seat of the car since Wunsch's presence at the car was not the result of an illegal stop.

We hold that the officer had probable cause to initially enter the car. He had been informed, through a police agency, that Fowler was driving a vehicle into the State of Washington, was armed and dangerous, and was in the course of committing a felony. When he approached the car, he saw two weapons in plain view on the back seat. A washington statute prohibits the carrying of a loaded pistol in a vehicle.[1] The trooper's investigation of the status of the weapons and his

subsequent finding of the third loaded weapon were certainly warranted and no more than would be expected of a reasonable and competent police officer.

Further, as above noted, that entry was terminated and those weapons placed upon the hood of the Fowler vehicle. None of those "seized" weapons were relevant to the instant case nor were they offered or admitted in evidence. It was only after the arrival on the scene of Fowler's wife and Tuefel that an additional search ensued which produced the weapon in controversy here. The facts as noted above support the finding of probable cause to search for the fourth gun. Fowler, who was accused of kidnapping, was found in a car with a child and a loaded gun. The information leading to this belief stemmed in part

from a statement of an eyewitness (Erk), that she feared for the safety of the child. The two other guns found in the car were identified as being stolen. Fowler's wife indicated that another gun, which may or may not have been loaded, was still in the car. When the police are told that a gun is still in a car that is parked on the side of a heavily used highway and the situation is as potentially explosive as this one was, it would be unreasonable for the police not to search for the gun. Once the police have probable cause, they may search a car parked on a public highway without a warrant under the automobile exception. See Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); Chambers v. Maroney, 399 U.S. 42 (1970); Carrol v. United States, 267 U.S. 132 (1925); State v. Pate, 529 P.2d 875 (Wash.

Ct. App. 1974); State v. Orcutt, 591 P.2d 872 (Wash. Ct. App. 1979).

It is also argued that the delivery of the gun by the Washington state trooper to Idaho officer Black was somehow invalid. The requirement for search warrants protects an individual from unreasonable official intrusions. Here, the search was valid and once the weapon had been lawfully seized by the Washington state trooper, the intrusion into privacy ceased. Officer Black, by accepting the delivery of the gun from the Washington state trooper, was not intruding into Fowler's privacy. Black was familiar with the Mileck assault, knew that Fowler was a suspect and had knowledge, through Mrs. Fowler, that the weapon had been used in the Mileck assault. We hold that argument to be

without merit.

We turn now to the admissibility of the testimony of Fowler's wife. At the time of trial, Fowler and his wife had been divorced. Fowler asserts, nevertheless, that the testimony of his ex-wife should have been excluded under the marital privilege doctrine. I.C. § 9-203 (1) encompasses two privileges: (1) neither spouse may testify for or against the other without the other spouse's consent, and (2) neither spouse may testify as to any communication made by one to the other during marriage. A divorce prior to trial terminates the incompetency of one spouse to testify against the other. See State v. Anspaugh, 97 Idaho 519, 547 P.2d 1124 (1976). Divorce, however, does not terminate the privilege afforded marital communications made

during the existence of the marriage. State v. Anspaugh, supra. That privilege may encompass non-verbal acts which are communicative in nature, i.e., the shaking or nodding of the head or the like.

At the time of trial, Fowler's former wife testified that Fowler possessed a .45 caliber revolver at the time of the Mileck assault, that the gun was kept in Fowler's nightstand, and that she moved the gun to a different location in the summer of 1977. Fowler argues that knowledge of the gun was a confidential spousal communication. We do not agree. Knowledge of the possessions of one spouse and their location is generally not a spousal communication. See United States v. Bolzer, 556 F.2d 948 (9th Cir. 1977). Her testimony as

to her own actions is also not a marital communication. See State v. Hermes, 426 P.2d 494 (Wash. 1967). Hence, we find no merit in Fowler's assertion that the testimony of his former wife was inadmissible.

We have examined appellant's remaining assertions of error and find them to be without merit. The judgment is affirmed.

McFADDEN, J., concurs. DONALDSON, C. J., and BAKES, J., concur in the result.

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The applicable Washington statute, R.C.W.A. 9.41.050, provides in pertinent part: "No person shall carry a pistol in any vehicle unless it is unloaded * * * without a license therefor as hereinafter provided."

BISTLINE, J., concurring in the affirmance.

I write only because of the majority's failure to deal with cases in both Washington and Idaho which on their face appear to be irreconcilable with the opinion the Court announces today. State v. Post, 98 Idaho 834, 573 P.2d 153 (1978); State v. Miles, 97 Idaho 396, 545 P.2d 484 (1976), and State v. Orcutt, 591 P.2d 872 (Wash.App. 1979), would appear to mandate that we reverse. Although I am not persuaded that we should reverse, I decline to join in an opinion which follows Miles by only four years, but which fails to distinguish that case from this.[1] Accordingly, I endeavor to set forth and discuss my view of these cases, from which I conclude that, although the question is very close, Miles

is distinguishable, albeit the degree is slight.[2]

In Miles the police were told by people from whom they had purchased marijuana that the defendants would be arriving with more marijuana in 45 minutes. When the defendants pulled into the driveway two hours later, the police ordered them to lie on the ground and then searched the car, where they found a large quantity of marijuana. This Court, first holding that the search could not be justified as incident to an arrest, then stated that Carroll v. United States, 267 U.S. 132 (1925), [3] requires that the State show that it is impractical to obtain a search warrant in order to justify a warrantless search of an automobile. The Court concluded that the State had not shown that it was impractical to

obtain a search warrant:

> "Taking judicial notice of the fact that there are four magistrates in Coeur d'Alene available for issuing search warrants, it would not seem unduly burdensome on the police to station one of four officers present with the car, while the others made the short drive into town to secure the search warrant. Here, there simply were no exigent circumstances making it impractical to gain a search warrant." 97 Idaho at 400-01, 545 P.2d at 488-489.

In State v. Post, 98 Idaho 834, 573 P.2d 153 (1978), Officer Richard smelled marijuana on the defendant and observed smoke and two hand-rolled cigarettes in the defendant's car, which was parked in a parking lot adjacent to a street. Richard then searched the defendant's pockets, finding a small amount of marijuana, and the defendant's car, where he found 7 ounces of marijuana. This Court

held first that the search of defendant's pockets was unlawful as there had been no lawful arrest and secondly that the search had exceeded that which was permissible as incident to an investigative stop. As to the search of the car, the Court held as follows:

> "The state, at oral argument, conceded that there was nothing in the record of this case suggesting any exigent circumstances, other than the mere presence of the car in a parking lot near a public street, and acknowledged that under our decision in State v. Miles, supra, there has not been a showing of exigent circumstances sufficient to avoid the warrant requirement on that basis." 98 Idaho at 838, 573 P.2d at 157.

See also State v. Landers, 97 Idaho 899, 556 P.2d 858 (1976) (Attorney General confessed error where police, on smell-marijuana in parked car, requested occupants to step out and then searched car).

In State v. Orcutt, 591 P.2d 872 (Wash.App. 1979), the police became suspicious of defendant's conduct and followed him to where he had parked and left his car. In looking for vehicle identification in the car, the police observed an open pack of Zig Zag cigarette papers and what appeared to be some brownish flakes of marijuana. The police subsequently located defendant nearby and arrested him for driving with a suspended license. The officers then told the defendant that his car would have to be moved, and defendant consented to their moving the car back to the store parking lot so that his belongings would be secure. At this point the officers made a second search of the interior of the vehicle. The court held that this was not a case where it was not practicable to secure a warrant, and found

insufficient evidence of exigent circumstances to justify the search without a warrant:

> "The vehicle here was in no danger of departure. It was secure. There was more than one officer available to effect a defendant's arrest and obtain the warrant while the other watched the vehicle and secured its contents. Absent exigent circumstances, the warrantless search even with probable cause violated the Fourth Amendment." 591 P.2d at 876.

If the exact language in these three cases were to be followed in the present case, it would appear that the incriminating gun should be suppressed. The incident occurred about 6:00 p.m. on a Wednesday, and there were numerous police officers present; under the rationale of Miles, one officer could have been left to secure the car while another went to

obtain a warrant.[5] I doubt, however, that such is in harmony with the view of the average lay person, whom I surmise would find that it is not unreasonable for the police to search a car where they have good reason (probable cause) to believe it contains a gun in the circumstances present in this case. Nor do I believe that suppression has to follow from Miles.

The trial court, Judge Prather, in a very thorough and well reasoned opinion, noted this problem: it is arguable that the court would have a difficult time finding the search in the present case to be justified, absent an overruling of the decision in Miles." Judge Prather went on to note that "[e]ven though Miles may be too recent to be overruled, it is important to realize that the Miles

decision totally fails to address the case of Chambers v. Maroney, supra [399 U.S. 42 (1970)]."

In Chambers, as discussed by the trial court, the United States Supreme Court upheld the warrantless search of an auto. In that case, the police arrested the occupants of the vehicle shortly after a robbery on the basis of a description given by witnesses. The Court upheld the subsequent search of the car as follows:

> "Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since

a car is readily movable. Where this is true, as in Carroll, and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.

. . . .

"Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and

holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

"On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." 399 U.S. at 50-52 (footnotes omitted) (emphasis added).

See also Arkansas v. Sanders, 99 S.Ct. 2586, 2594 n.14 (1979) (in reply to the State's argument that "if the police were entitled to seize the suitcase [taken from a car], then they were entitled to search it," the Court noted that requiring police to seize and hold a vehicle rather than search it immediately "would have imposed severe, even impossible, burdens on many police departments," while no such burdens were likely to exist with respect to the seizure of personal luggage).

It is important to note at this point that neither Miles, Post, nor Orcutt, in discussing the existence of exigent circumstances, dealt with Chambers. The trial court in the present case thus held that "[s]ince the Chambers doctrine has not been expressly rejected by the Idaho

Supreme Court, it is applicable herein," and on this basis held that the automobile exception to the warrant requirement applied, making the warrantless search permissible.

The question now before this Court, which the majority opinion disposes of rather perfunctorily, is whether the police should have delayed the search until they could obtain a warrant, i.e., were the police required to post one officer to guard the car for the time it would take another officer to obtain a warrant? In discussing this general question, one text has noted that "[t]he lower courts have experienced considerable difficulty with this question, which is none too surprising in light of the fact that the Supreme Court has not indicated what possible showing of exigent

circumstances (if any) is needed to justify a warrantless search." W. LaFave, 2 Search and Seizure § 7.2(c) at 526 (1978).[6] There is no reason, however, for this Court to merely sit by. The question is squarely before us and the way is made clear by the light of the exhaustive treatment accorded the question and handed to us in Judge Prather's memorandum decision.

The majority of this Court, however, decline the thrown gauntlet, preferring to base their holding that this warrantless vehicle search was permissible solely on the bald assertion that "[o]nce the police have probable cause, they may search a car parked on a public highway without a warrant under the automobile exception."[7] Apparently the majority believes that a search while the car is

parked in a parking lot near a street, as in Post, is unacceptable, but a search is permissible if the car is parked on a public way.

Although I cannot accept that reasoning, nonetheless, I believe that this case is distinguishable from Miles. "Impracticability" was given meaning in Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971):

> "And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States--no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible

> stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant,' Carroll, supra, at 153, and the 'automobile exception,' despite its label, is simply irrelevant." (Footnote omitted.)

In Miles, all those involved in the criminal enterprise were under restraint, the car was parked in a private driveway, apparently with no one else around, and the police had known for some time that the car would be arriving, allegedly with drugs. Moreover, the location of the search was only a short distance from town. In Post, that issue was not a problem as the State conceded it at oral argument. In Orcutt, which also involved drugs, the police had complete control of the car, which was being put in the parking lot of a store, and the only person around with an interest in the car was

under arrest.

In the present case, however, there were several people in the area of the car who were not under arrest; the police were not yet sure what action was to be taken with Fowler, or the car; three guns, including one that was loaded, had already been found in the car; the search was for another gun, not drugs; and the car was parked on a heavily traveled roadway, at some distance from the nearest city. The facts of this case are thus more similar to those in Chambers than in Miles, Post, or Orcutt, and, like the trial court, I believe that Chambers is controlling and that it would have been impractical for the police to obtain a warrant. The search was therefore justified. However, it remains for this entire Court, not simply one member of this Court,

to delineate the effect of today's decision on Miles and Post, and until that is done the bench and bar will simply have to wait out some later decision.

The judgment of conviction should be affirmed.

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1

Post, in which I participated, was predicated entirely on the earlier holding of Miles, in which I did not participate.

2

I doubt the validity of the premise in the Court's opinion that because Fowler stopped his car "voluntarily" there is no need to consider whether the stop was proper. The police had every intention of stopping Fowler, and the fact that he stopped before being signaled to do so does not automatically legitimatize the search. This is not

the situation where the police inadvertently happen upon a parked car; rather, this is simply a case where Fowler rather than the police picked the place to pull over. Since the police would have been justified in stopping Fowler anyway, see e.g., Adam v. Williams, 407 U.S. 143 (1972); State v. Hobson, 95 Idaho 920, 523 P.2d 523 (1974); see also State v. Deschamps, 94 Idaho 612, 495 P.2 18 (1971), the Court should accept this for what it was--a legitimate stop by the police.

3

In Carroll, although the Court stated that "[i]n cases where the accuring of a warrant is reasonably practicable, it must be used," 267 U.S. at 156, the Court upheld a warrantless search of a vehicle. In that case the police had no chance to obtain a warrant before coming upon the car. Nor, apparently, did they have probable cause to take custody of the occupants of the car to prevent its further movement until a search warrant could be obtained. All that they had was probable cause to believe that the car contained contraband. Such was the justification for an immediate search of the vehicle.

4

But see State v. Pate, 529 P.2d 875 (Wash.App. 1974), in which the panel of judges included two who later joined in Orcutt; there the court upheld a warrantless search for drugs of a car parked in a public parking lot on the basis of

Chambers v. Maroney, 399 U.S. 42 (1970).

5

No contention is made that the police were without authority to detain this car. Mrs. Fowler, to whom it was released, had no apparent ownership interest in it as it was registered to the Church of Jesus Christ Christian, Inc. Thus there is no need to discuss whether the police would have had the right to detain the car if the owner had demanded it.

6

For cases suggesting that the police should post a guard over the vehicle while another officer attempts to secure a warrant, see e.g., State v. Massey, 310 So.2d 557 (La. 1975) (no exigent circumstances where at least ten police present at search, owners of car under arrest, car locked, and keys in custody of police): Freeman v. State, 527 S.W.2d 909, 916 (Ark. 1975) (no reason exists why some officers could not have maintained a guard to prevent the removal of evidence while a warrant was obtained); People v. White, 221 N.W.2d 357, 363 (Mich. 1974), cert. denied 420 U.S. 912 (1975) ("appellant's automobile was parked and unoccupied when the police arrived with an ample number of officers to allow the automobile to be guarded while a warrant was sought"); State v. Navarro, 312 So.2d 848, 851 (La. 1975) (no exigent circumstances where both occupants of car were under arrest and were to be taken to jail); United States v. Bradshaw, 490 F.2d 1097, 1103-04 (4th Cir.), cert. denied 419 U.S. 895

(1974) (no exigent circumstances "since two of the agents could have guarded the truck smelling of moonshine whiskey while the third obtained a warrant without significant risk of loss of evidence").

Other cases, however, have not been willing to require the police to post a guard while they sought a warrant. See e.g., United States v. Frick, 490 F.2d 666 (5th Cir. 1973), cert. denied 419 U.S. 831 (1974) (in justifying search of car incident to lawful arrest); United States v. Evans, 481 F.2d 990, 994 (9th Cir. 1973) ("standing guard still represents the same interference with property rights as well as an unnecessary use of law enforcement personnel"); United States v. Bozada, 473 F.2d 389, 391 (8th Cir.), cert. denied 411 U.S. 969 (1973); ("[w]e are not impressed with the notion that a stakeout or limited seizure of the trailer should have been made while a search warrant was being procured. That could well pose more problems then it would solve"); United States v. Menke, 468, F.2d 20, 23 (3d Cir. 1972) ("[w]here an automobile is the subject of the search, the possibility of its movement and the concomitant disappearance of the contraband is a more critical factor than a count of the number of agents present who could be dispatched to a warrant-issuing authority").

7

Although the majority also discusses the fact that the police were told that a gun was in the car, that the car was parked on a heavily-used highway, and

that the situation was "potentially explosive," these factors go unmentioned in the conclusionary sentence.

CASE NO. _____

SUPREME COURT OF THE UNITED STATES

STATE OF IDAHO
Respondent

v.

WILLIAM V. FOWLER
Petitioner

NOTICE OF APPEARANCE

Stephen B. McCrea, attorney for Petitioner, hereby gives notice of his appearance as counsel for Petitioner in this Court.

DATED:

_____
STEPHEN B. McCREA
Attorney at Law

CASE NO. _____

SUPREME COURT OF THE UNITED STATES

STATE OF IDAHO
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v.

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Petitioner

CERTIFICATE OF FILING BY MAIL

STATE OF IDAHO )
) ss.
COUNTY OF KOOTENAI )

Stephen B. McCrea, being first duly sworn, states as follows:

I am a member of the bar of this Court. On November , 1980, I deposited 40 copies of the Petition for Writ of Certiorari in the above-entitled matter in the United States mail, first class, postage prepaid, and properly addressed to the Clerk of this Court, within the 60 days

allowed for filing from the 7th day of October, 1980, date of the decision of the Idaho Supreme Court.

STEPHEN B. McCREA
Attorney at Law

STATE OF IDAHO )
) ss.
COUNTY OF KOOTENAI )

On this _____ day of November, 1980, before me, a Notary Public, personally appeared STEPHEN B. McCREA, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Notary Public for Idaho
Residing in Coeur d'Alene

CASE NO. _____

SUPREME COURT OF THE UNITED STATES

STATE OF IDAHO
Respondent

v.

WILLIAM V. FOWLER
Petitioner

CERTIFICATE OF SERVICE

I certify that I deposited three copies of the within Petition for Writ of Certiorari in the United States mail, first class, postage prepaid and addressed to DAVID LEROY, Attorney General for the State of Idaho, Statehouse, Boise, Idaho, in compliance with the provisions of Supreme Court Rule 28.3. All parties to the proceeding required to be served have been served.

DATED: _____

STEPHEN B. McCREA
Attorney at Law